Supreme Court, U.S.
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No. 96-913

In The

Supreme Court of the United States

October Term, 1996

KAREN L. CAMILLI,

Petitioner,

v.

INDUSTRIAL COMMISSION OF ARIZONA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent concurs with the Question Presented as set forth in the Petitioner's Petition.

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There is no conflict among the Circuits regarding the issue presented hereinbelow. Case law and legislative history are consistent in defining a tax for bankruptcy purposes. Any perceived conflict is simply a result of the interpretation of Ohio law.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The Industrial Commission of Arizona (hereinafter "ICA") respectfully requests that this Court not issue a Writ of Certiorari to review the judgment and the opinion of the United States Court of Appeals for the Ninth Circuit. The decision reached by the Ninth Circuit Court of Appeals on September 5, 1996 is not in conflict with the decision of the Sixth Circuit Court of Appeals nor is the issue presented herein "an important federal question." Review by this Court is neither appropriate nor necessary.

OPINIONS BELOW

Respondent concurs with the Statement of Opinions Below as set forth in the Petitioner's petition.

JURISDICTION

Respondent concurs with the Statement of Jurisdiction as set forth in the Petitioner's petition.

STATUTES INVOLVED IN THE CASE

Arizona Revised Statutes § 23-906 provides:

> A. Employers who comply with the provisions of section 23-961 or 23-962 as to securing compensation, and the employers' workmen's compensation insurance carriers or administrative service representatives, shall not be liable for damages at common law or by statute, except as provided in this section, for injury or death of an employee wherever occurring, but it shall be

optional with employees to accept compensation as provided by this chapter or to reject the provisions of this chapter and retain the right to sue the employer as provided by law.

B. The employee's election to reject the provisions of this chapter shall be made by a notice in writing, signed and dated by him and given to his employer, in duplicate in substantially the following form: "To (name of the employer): You are hereby notified that the undersigned elects to reject the terms, conditions and provisions of the law for the payment of compensation, as provided by the compulsory compensation law of the state of Arizona, and acts amendatory thereto."

C. The notice shall be filed with the employer prior to injuries sustained by the employee, and within five days the employer shall file with his insurance carrier the notice so served by the employee. All employees shall be conclusively presumed to have elected to take compensation in accordance with the terms, conditions and provision of this chapter unless the notice in writing has been served by the employee upon his employer prior to injury.

D. Every employer engaged in the occupations designated in this chapter shall post and keep posted in a conspicuous place upon his premises, in all languages spoken by his employees and available for inspection by all workmen, a notice in substantially the following form: "All employees are hereby notified that in the event they do not specifically reject the provisions of the compulsory compensation law they are deemed by the laws of Arizona to have accepted the provisions of such law, and to have elected

to accept compensation under the terms of such law, and that under the terms thereof employees have the right to reject the same by written notice thereof prior to any injury sustained, and that blanks and forms for such notice are available to all employees at the office of this company."

E. If an employer fails to post and keep posted the notice as required by this section, or fails to keep available at the place where the employees are hired the blank forms of notice to be signed by the employee, no employee who thereafter engages in employment for such employer, during the time that the notices are not posted or during the time that the blanks are not available, shall be deemed to have accepted the provisions of this chapter, and it shall be optional for such employee, if injured during the period when blanks were not available or the notice was not posted, to accept compensation under the provisions of this chapter or maintain other action against the employer.

Arizona Revised Statutes § 23-907 provides:

A. Employers who are subject to and who fail to comply with the provisions of § 23-961 or 23-962 shall not be entitled to the benefits of this chapter during the period of noncompliance, but shall be liable in an action under any other applicable law of the state. In such action the defendant shall not avail himself of the defenses of assumption of risk or contributory negligence. In all such actions proof of the injury shall constitute prima facie evidence of negligence on the part of the employer and the burden shall be upon the employer to show freedom from negligence resulting in the injury.

B. An employee of such an employer, or the employee's dependents in case death ensued, may, in lieu of proceeding against the employer by civil action in court, file his application with the commission for compensation in accordance with the provisions of this chapter, and the commission shall hear and determine the application for compensation in the manner other claims are heard and determined before the commission. The compensation so determined shall be paid from the special fund established by § 23-1065 to the person entitled thereto after a finding and award for benefits has been issued and becomes final.

C. The employer shall be notified of his liability to the special fund periodically and this notice shall include a ten percent penalty of the amount expended by the special fund or a penalty of five hundred dollars, whichever is greater, plus interest on the amount expended and the penalty pursuant to § 44-1201. The payments made from the special fund pursuant to the award plus the penalty shall act as a judgment against the employer. The commission shall file the award in the office of the clerk of the superior court in any county in the state and such award shall be entered in the civil order book and judgment docket and when so filed and entered shall be a lien for eight years from the date of the award upon the property of the employer located in the county. Execution may issue thereon within eight years in the same manner and with like effect as if the award were a judgment of the superior court. The commission may recover reasonable attorney fees

incurred pursuant to this section. Any civil penalties and interest assessed pursuant to this section shall be transmitted to the state treasurer for deposit in the state general fund and any payments and attorney fees shall be deposited in the special fund account.

D. An employer with one or more employees who is required to comply with the provisions of this chapter but who fails to obtain coverage through an insurance carrier or as a self-insurer shall be subject to an action by the commission to apply to the court for an injunction which shall cause the employer to cease the operation of his business until such employer complies with the provisions of law pertaining thereto.

E. The commission and other state and local governmental agencies may exchange information concerning employers who fail to comply with § 23-961 or 23-962 with other federal, state or local governmental agencies. This exchange of information shall be made only for the purpose of the valid administrative needs of the programs administered by the commission or other agencies and shall not be made for the purpose of criminal prosecution of an employer.

F. The commission may assess a civil penalty of five hundred dollars on an uninsured employer if the commission makes an award for a noncompensable claim for a claim against the employer and finds that:

1. At the time of the accident for which the claim was made the employer was subject to this chapter.

2. The employer was not insured pursuant to this chapter.

G. The commission may issue an order assessing a civil penalty of not to exceed five hundred dollars on an employer who is subject to this chapter and who is not insured pursuant to this chapter. The order is final against the employer unless the employer requests a hearing before the commission within fifteen working days after a copy of the order is mailed to the employer. Following the hearing the commission may affirm, reverse or modify its order and shall serve a copy of its decision by regular mail on the employer. An employer aggrieved by this decision may seek judicial review pursuant to title 12, chapter 7, article 6[1]

H. Civil penalties assessed pursuant to subsections F and G of this section are payable to the state general fund and shall act as a judgment in the same manner as prescribed in subsection C of this section. Recovery of attorney fees and accrual of interest are the same as prescribed in subsection C of this section.

I. The commission may compromise or otherwise settle a disputed claim with an employee of an employer who is subject to and who fails to comply with the provisions of § 23-961 or 23-962 by filing a notice of compromise and settlement or notice of stipulation with the presiding administrative law judge. The notice shall be served on the employer at the last known mailing address as shown on the records of the commission. The employer shall keep the commission informed of its current mailing address once the employer has been notified by the commission of the filing of a claim against the

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[1] Sections 12-901 to 12-914.

> employer. If the employer does not request a hearing protesting the terms of the agreement or stipulation within ten working days of the service of the notice, the commission and the employee may execute the agreement or stipulation without the consent of the employer, subject to the approval of the presiding administrative law judge. Any payments made to the employee pursuant to this subsection shall be paid from the special fund and are subject to reimbursement and collection from the employer in the same manner as other payments made pursuant to this chapter.

Arizona Revised Statutes § 23-921 provides:

> A. The industrial commission of Arizona is charged with the duties of the administration of this chapter, and with the adjudication of claims for compensation arising out of provisions of this chapter and any of its members or assistants so authorized may:
>
> 1. Hold hearings at any place within the state or without the state by the agreement of the parties.
>
> 2. Administer oaths.
>
> 3. Issue and serve by the commission's representatives, or by any sheriff, subpoenas for the attendance of witnesses and claimants and the production of reports, papers, contracts, books, accounts, documents and testimony. The commission may require the attendance and testimony of employers, their officers and representatives before any proceeding of the commission, and the production of employees of books, records, papers and documents.

4. Generally provide for the taking of testimony and for the recording of proceedings held in accordance with this chapter.

B. The commission may make and declare all rules and regulations which are reasonably required in the performance of its duties, including but not limited to rules of practice and procedure in connection with hearing and review proceedings. Such rules and regulations may provide for informal prehearing conferences in order to expedite claim adjudication, amicably dispose of controversies, narrow issues and simplify the method of proof at hearings.

C. The commission may incur such expenses as it determines are reasonably necessary to perform its authorized functions, which expenses shall be a charge against the administrative fund.

D. The commission may charge any person with contempt who refuses to comply with any order of the commission, upon application to the superior court. Any person held in contempt may be punished by a fine of not to exceed one thousand dollars.

Arizona Revised Statutes § 23-926 provides:

A. All books, records and payrolls of the employer, including nonconfidential employer records on file with other state or local governmental agencies, showing or reflecting in any way the wage expenditure of the employer shall always be open for inspection by the commission or its assistants to ascertain information necessary for its administration of the law.

> B. An employer who refuses to submit his books, records and payrolls for inspection as provided by this section is liable for a penalty of five hundred dollars for each offense which shall be collected by a civil action in the name of the state, and the recovery shall be paid to the state general fund. The commission may recover reasonable attorney fees incurred pursuant to this section.

Arizona Revised Statutes § 23-927 provides:

> A commissioner may enter any place of employment to collect facts and statistics, and may bring to the attention of any employer any law or order of the commission and the failure of such employer to comply therewith. No employer shall refuse to admit a commissioner to his place of employment.

Arizona Revised Statutes § 23-929 provides:

> Upon request of the commission the attorney general, or under his direction the county attorney of the proper county, shall institute and prosecute the necessary actions or proceedings for the enforcement of the provisions of this chapter, or for any penalty provided for in this chapter, and shall prosecute or defend all actions or proceedings brought by or against the commission, or the members thereof in their official capacity. The commission may compromise any action.

Arizona Revised Statutes § 23-932 provides:

> A person who violates any provision of this chapter, commits any act therein prohibited, knowingly fails or refuses to perform any duty thereby imposed within the time prescribed by

> law or by the commission, or knowingly fails or refuses to obey an order of the commission or a judgment of a court made and entered under the provisions of this chapter, for which no penalty or punishment is otherwise specifically provided, is guilty of a class 2 misdemeanor.

Arizona Revised Statutes § 23-933 provides:

> Judgments obtained in any action prosecuted by the commission or by the state under the authority of this chapter shall have the same priority against the assets of the employer as claims for taxes.

Arizona Revised Statutes § 23-950 provides:

> Actions and proceedings under this chapter and actions or proceedings to which the commission, the insurance department, or the state is a party in which any question arises under this chapter or concerning an award of the commission, or an order of the commission or insurance department shall be advanced for trial or hearing over civil actions, except election contests and actions affecting the corporation commission.

STATEMENT OF THE CASE

Respondent concurs with the Statement of the Case as set forth in the Petitioner's Petition.

REASONS FOR NOT GRANTING THE WRIT

The distinction between a "tax" and a "fee" for bankruptcy purposes is not a new question before this Court.

In the early part of the Twentieth Century this Court clearly stated the law determining when an obligation is a tax for bankruptcy purposes: "Generally speaking, a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the government . . . " and "capable of being enforced by action against the will of the taxpayer." *State of New Jersey v. Anderson*, 203 U.S. 483, 492, 27 S.Ct. 137, 140 (1906). Justice Day, in his decision in *Anderson, supra*, went on to distinguish between a tax and a debt:

> Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the government or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate *in invitum*. Nor is their nature affected by the fact that in some states - and we believe in Tennessee - an action of debt may be instituted for their recovery. The form of procedure cannot change their character. *State of New Jersey v. Anderson*, 27 S.Ct. 140 (citing *Meriwether v. Garrett*, 102 U.S. 472).

The decision of the United States Supreme Court in *State of New Jersey v. Anderson* was entered twenty years after the *Head Money Cases (Edye v. Robertson)*, 112 U.S. 580, 5 S.Ct. 247, 28 L.Ed. 798 (1884), a case relied upon by Petitioner. The *Head Money Cases* case did not concern bankruptcy and is equally irrelevant to the holding in *State of New Jersey v. Anderson, supra*, as to the disposition of the pending application.

In 1941 this Court ruled in two other cases concerning the definition of a tax for bankruptcy purposes. In

City of New York v. Feiring, 313 U.S. 283 (1941) this Court reiterated the test announced in *State of New Jersey v. Anderson*, supra; "[T]he priority commanded by § 64 extends to those pecuniary burdens laid upon individuals or their property, regardless of their consent, for the purpose of defraying the expenses of government or of undertakings authorized by it." 313 U.S. at page 285. The Court then analyzed the specific provisions of the state statute to determine "whether its incidents are such as to constitute a tax within the meaning of § 64." 313 U.S. at page 285. The Court determined that the statute was intended to defray the expenses of unemployment relief, imposed penalties for its violation, authorized the City of New York to bring actions for the recovery of the liability as an alternative remedy or authorized that a warrant may be issued directly to the sheriff of the county to levy upon property of the obligor.

> A pecuniary burden so laid upon the bankrupt seller for the support of government, and without its consent, thus has all the characteristics of a tax entitled to priority payment in bankruptcy within the meaning of § 64 of the Bankruptcy Act. . . . While an action in debt may be resorted to for the recovery of a tax, it is evident that in this case the bankrupt is liable to the state only because it owes a tax. *City of New York v. Feiring, supra*, 313 U.S. at page 287 and 288.

The rights of the Industrial Commission of Arizona as set forth in its statutory power are similar to those granted to the City of New York which were reviewed by this Court in *City of New York v. Feiring, supra. See also United States v. New York*, 315 U.S. 510 (1942) in which this Court held that an employer's contribution under §§ 801 and 802 of

Title 8 of the Social Security Act is a tax under § 64(a)(4) of the prior Bankruptcy Act.

The legislative history of § 507 of the Bankruptcy Code is void of any suggestion that the liability at issue here, found to be a tax under the Bankruptcy Act, is to be given a different meaning under the Code. *See United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 116 S.Ct. 2106 (1996). "The kinds of taxes that are entitled to priority under H.R. 8200 closely follows the categories granted priority under the Bankruptcy Act . . . " *House of Representatives*, 95-595 page 190. The legislative history of the Bankruptcy Code states "All federal, state or local taxes generally considered or expressly treated as excises are covered by this category, including sales taxes, estate and gift taxes, gasoline and special fuel taxes and wagering and truck taxes." *124 Congressional Record H11113*, September 28, 1978.

Even in a non-bankruptcy context, this Court has distinguished between a "tax" and a "fee". In *National Cable Television Assn., Inc. v. United States, et al.*, 415 U.S. 336 (1975) Justice Douglas, writing for the Court, stated:

> Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the government upon a taxpayer and go solely on the ability to pay, based on property or income. A fee, however, is incident to a voluntary act, *e.g.* a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant, which, presumably, bestows a benefit on the applicant, not

> shared by other members of society. . . . A "fee" connotes a "benefit" and the Act by its use of the standard "value to the recipient" carries that connotation. *National Cable Television Assn., Inc., supra,* 415 U.S. at page 340 - 341.

Consistent with this Court's prior decisions, a number of Circuit Courts of Appeal have analyzed the treatment of obligations to a state in a bankruptcy context. All of the Circuit Courts of Appeal addressing this issue, both in the context of workers' compensation and in other contexts, have followed the same analytical path in determining the nature of the obligation due the various state governments.

In the area of workers' compensation, Circuit Courts in the First, Second, Fourth and Ninth Circuits have all recognized that obligations due and owing various state industrial commissions are non-dischargeable priority tax obligations. *See Pan American Paper Mills, Inc.,* 618 F.2d 159 (1st Cir.1980); *New Neighborhoods, Inc. v. West Virginia Compensation Fund,* 886 F.2d 714 (4th Cir.1989); *In re Camilli,* 94 F.3d 1330 (9th Cir.1996); and *In re Chateaugay Corporation,* 89 F.3d 942 (2nd Cir.1996). The Fourth Circuit Court of Appeals has also applied these tests in the context of an uninsured motorist insurance fund (*Williams v. Motley,* 925 F.2d 741 (4th Cir.1991)) and the Sixth Circuit has analyzed obligations due under strip mining reclamation funds (*In re Jenny Linn Mining Co.,* 780 F.2d 585 (6th Cir.1986), *United States of America v. River Coal Co., Inc.,* 748 F.2d 1103 (6th Cir.1984)) and workers' compensation premiums (*Ohio Bureau of Workers' Compensation v. Yoder (In re Suburban Motor Freight, Inc. I)* 998 F.2d 338 (6th Cir.1993)).

The Sixth Circuit Court of Appeals decision of *Ohio Bureau of Workers' Compensation v. Yoder* (*In re Suburban Motor Freight, Inc., II*), 36 F.3d 484 (6th Cir.1994) reaches a different conclusion then that reached by the First, Second, Fourth and Ninth Circuits. That decision conficts with the result it reached in *Suburban I, supra,* in which it held that *premiums* due the commission were excise taxes. The Sixth Circuit Court of Appeals adopted the same standard of review in both cases yet reached different results. Notwithstanding the ultimate difference in conclusions reached by these Courts, Petitioner's alleged conflict among the Circuits simply does not exist. The Sixth Circuit Court of Appeals in *Suburban II* utilized the same analysis articulated by this Court and by the First, Second, Fourth and Ninth Circuits in analyzing the difference between a fee and a tax for bankruptcy purposes. The Sixth Circuit concluded that, under the specific facts and circumstances of that unique case, the obligation due and owing the Ohio Bureau of Workers' Compensation fell outside the judicially established definition of a tax for bankruptcy purposes.

The Sixth Circuit Court of Appeals decision in *Suburban II* relied on two significant facts present neither in the *Camilli* case at bar nor in the other cases decided in the other Circuits: 1) The Ohio Bureau of Workers' Compensation had already been allowed a priority claim for unpaid premiums in *Suburban I;* and 2) private sureties had also paid out benefits to injured employees under provisions of the state self-insured plan under which Suburban Motor Freight, Inc. had been operating. The Sixth Circuit Court of Appeals noted that providing priority treatment to the state fund but denying priority

treatment to the private sureties who had paid identical claims would be an unfair advantage to the state fund at the expense of the private sureties. *Suburban II*, 36 F.3d at page 489.

Despite the difference in conclusions, the *Suburban II* Court relied upon the same line of cases cited hereinabove and included in its analysis the four prong test utilized by the Ninth Circuit Court of Appeals in *County Sanitation District v. Lorber Industries of California*, 675 F.2d 1062 (9th Cir.1982) and relied upon by the Ninth Circuit Court of Appeals in the case below: 1) an involuntary pecuniary burden; 2) imposed by the state legislature; 3) for a public purpose; and 4) under the police or taxing power of the state.

The first prong of the "Lorber" test, an involuntary pecuniary burden, is similar in its analysis to the test announced by this Court in *National Cable Television Assn., Inc., supra; i.e.* the distinction between a fee and a tax resting upon the election by the obligor to participate in a venture for profit and being charged a fee for that election to participate. The Sixth Circuit Court of Appeals specifically relied upon the Fourth Circuit Court of Appeals' decision in *In re New Neighborhoods, supra*, as the basis of its decision, a decision which is consistent with the decision of the Ninth Circuit Court of Appeals hereinbelow.

The Ninth Circuit Court of Appeals, in its decision below, specifically noted that its decision was not in conflict with the decision of the Sixth Circuit Court of Appeals in *Suburban II, supra.*

> Accordingly, the Sixth Circuit's decisions in *Suburban I* and *Suburban II* are fully consistent with

> our holding that the exclusive and universal obligation under Arizona law of the Special Fund to provide compensation to employees of uninsured employers is a "tax" entitled to priority under the Bankruptcy Code. Because the obligations (sic) in this case meet the four additional requirements set forth by the Sixth Circuit in *Suburban I*, as well as the criteria of *Lorber*, there is no need to decide whether the *Suburban I* requirements must be met in all cases. *Camilli v. Industrial Commission of Arizona*, 94 F.3d 1330, 1334 (9th Cir.1996).

There is no conflict among the Circuits regarding this issue. The *Suburban II* decision simply reflects a unique circumstance arising under the facts of the case and under applicable Ohio law. Certiorari is inappropriate.

Even should this Court consider that *Suburban II* creates a conflict among the Circuits, Certiorari is still inappropriate. Four different Circuits addressing this issue, either in the context of workers' compensation premiums or benefits paid from a no-insurance fund, have recognized that this obligation is an excise tax. Two of these Circuits, the Second and the Ninth, entered their decisions after the Sixth Circuit issued its ruling in *Suburban II*. The *Suburban II* decision is itself in conflict with the *Suburban I* decision and prior Sixth Circuit decisions concerning strip mining reclamation fees.[2] Any conflict

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[2] The Sixth Circuit decision is also in conflict with a long line of Bankruptcy Court decisions which have interpreted the Ohio workers' compensation scheme as creating a non-dischargeable excise tax. *See generally Prime Line Industries*, 103 B.R. 861 (Bkrtcy.N.D.Ohio 1987); *In re Tri-Manufacturing & Sales*, 82 B.R. 58 (Bkrtcy.S.D.Ohio 1988).

that might potentially exist is being resolved by the Circuit Courts of Appeal themselves in their overwhelming recognition that the type of obligation contained herein is an excise tax. It is inconceivable that other Circuits addressing this issue will follow the strained and stretched reasoning of the Sixth Circuit panel in *Suburban II*.

In addition, this issue is not a significant federal issue worthy of review by this Court. The issues presented need not be determined in the context of federal court litigation. Each state court can determine for itself whether this type of obligation survives discharge in bankruptcy. This issue has been litigated numerous times and only rarely have federal appellate courts found it necessary to enter into the fray. Although this issue appears frequently in bankruptcy cases, it is not so significant a question of federal law as to warrant review in the Supreme Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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